

Mailing Date: November 18, 2009

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 08-2096
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
vs.	:	
	:	
GERMAINE M. MARCANO	:	
t/a RENAISSANCE BISTRO	:	License No. R-15015
550-552 N. THIRD ST.	:	
READING, PA 19601-2815	:	
	:	

Counsel for Licensee: George A. Gonzalez, Esquire
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Reading, PA 19601

Counsel for Bureau: Roy Harkavy, Esquire
Pennsylvania State Police,
Bureau of Liquor Control Enforcement
7448 Industrial Parkway
Macungie, PA 18062

OPINION

Germaine M. Mercano, t/a Renaissance Bistro (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle

("ALJ"), wherein the ALJ sustained the citation and imposed a fine in the amount of two hundred dollars (\$200.00)¹.

The citation charged Licensee with violating section 5.32(a) of the Liquor Control Board Regulations in that on March 15, 2008, Licensee permitted the use of a loudspeaker or similar device on the licensed premises whereby the sound of music or other entertainment or the advertisement thereof could be heard outside. [40 Pa. Code § 5.32(a)].

Pursuant to section 471 of the Liquor Code, the appeal in this case must be based solely on the record before the ALJ. [47 P.S. § 4-471]. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 484 A.2d 413 (Pa. Cmwlth. 1984).

¹ This case is one of five (5) citations that were decided based on an evidentiary hearing held on July 31, 2009. The aggregate fine for all five cases was one thousand nine hundred dollars (\$1,900.00).

In her appeal, Licensee argues that the decision of the ALJ was not based on substantial evidence because the testimony established that there could not be any noise emanating from the premises that could be considered noisy or intrusive because construction had been finished and the building was completely soundproof.

The Board has reviewed the record, including the ALJ's Adjudication and Order, with Licensee's contentions in mind, and has concluded that the ALJ's decision is supported by substantial evidence.

The record reveals that on March 15, 2008, Officer Roderick Jackson of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") visited the licensed premises. [N.T. 34]. He testified that he could hear music while standing in the parking lot and as far away as ninety (90) feet from the bar. [N.T. 34]. Once inside the premises, he observed that a jukebox was playing music that was electronically amplified through loudspeakers that were in various locations throughout the bar. [N.T. 35, 36]. This was the same music that he heard outside the establishment. [N.T. 35].

Licensee maintains that the evidence was insufficient to support a violation because the Licensee presented the testimony of an expert to prove that the building was completely soundproof so noise could not be heard

outside the building². Essentially, this is a challenge that amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to engage in a reevaluation of witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Pub. Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005). It is well-settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

In the instant case, the ALJ found the testimony of Officer Jackson to be credible and adequate to support the charge in the citation. The Board will not overturn the ALJ's well-reasoned opinion on nothing more than a suggestion that the expert witness who was not even present on the date in question, was more credible than the officer. Therefore, this argument must fail.

² Neither the testimony of Licensee's expert, Robert Pfromm, nor the reports provided by the expert offer the opinion that the building is "completely soundproof." [N.T. 55-59; Exhibits L-2, L-3]. It is of particular note that Mr. Pfromm testified that "that you could barely hear the music at all three feet from the building" and "with the doors shut, you could not hear the music at full volume appreciably." [N.T. 56]. These statements by the Licensee's expert indicate that the building was not completely soundproof.

Based on the foregoing, the Board concludes that the evidence submitted by the Bureau was sufficient to support a violation of section 5.32(a) and affirms the decision of the ALJ to sustain the citation.

ORDER

The decision of the ALJ in regard to Citation No. 08-2096 is affirmed.

The appeal of the Licensee is denied.

The fine has been paid in full.

Board Secretary